MONTANA LEGISLATIVE HISTORY

Chapter 449 19 77

Bill H 647 S _____ Original bill & history X C

H. Committee on JUDICIARY			S. Committee on JUDICIARY		
Hearing Date(s)	2/9	X C	Hearing Date(s)	3/28	X C
	2/15	X C	& EXEC. ACTION	_____	___C
EXEC. ACTION	2/23	X C		_____	___C
	_____	___C		_____	___C
Date Out	_____	___C			

Did this bill originate in an interim committee? ____Yes ____No

Committee _____ Report _____

House BILL NO. 647

INTRODUCED BY Stutz

A BILL FOR AN ACT ENTITLED: "AN ACT TO ESTABLISH A MANDATORY PRETRIAL REVIEW PANEL TO HEAR AND DETERMINE CLAIMS FOR MEDICAL LIABILITY; TO ESTABLISH RULES, PROCEDURES, AND FACILITIES TO IMPLEMENT AND ACCOMPLISH THE PURPOSE OF THE ACT; TO PROVIDE FOR A SCHEDULE OF COMPENSATION AND BENEFITS FOR AWARDS; TO GUARANTEE THE FINANCIAL RESPONSIBILITY OF HEALTH CARE PROVIDERS AND TO PROVIDE THE SOURCE FOR THE FUNDING OF THE ADMINISTRATION OF THE ACT AND THE PAYMENT OF AWARDS; AND OTHERWISE AMENDING THE INSURANCE LAWS WITH RESPECT TO SUCH PANEL; PROVIDING A DELAYED EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Definitions. As used in this act, the following definitions apply:

(1) "Health care provider" means any physician licensed to practice medicine in the state of Montana or a hospital, hospital-related facility, or long-term care facility.

(2) "Medical liability" means liability arising out of the injury or death of any person as the result of negligence or breach of contract in the rendering of professional services by a health care provider.

INTRODUCED BILL

(3) "Professional liability insurer" means any company authorized to do business in Montana or doing business in Montana and offering policies of professional liability insurance to health care providers and includes any insurance trust, joint underwriting association, mutual insurer, reciprocal insurer or any other entity or person offering such liability coverage, including any state insurance fund.

Section 2. Establishment of panel. A pretrial review panel is created to review all medical liability claims, except as provided in [section 5].

Section 3. Precondition to suit. No action for medical liability against a health care provider may be commenced in any court of this state before the claimant has filed his claim with the secretary of the panel as herein provided and a final decision on the claim is rendered by the panel, unless otherwise provided herein.

Section 4. Tolling of statute of limitations. The filing of the claim shall toll the applicable statute of limitations to and including a period of 90 days following the rendering of a final decision by the panel.

Section 5. Applicability of the act. The provisions of this act are not applicable to any claim in which suit has been filed in a district court of this state prior to the effective date of this act or if the claim is subject to a

valid arbitration agreement allowed by law.

Section 6. Creation of panel — hearing panels — compensation — terms of service — method of selection. (1) The pretrial review panel shall consist of 12 full-time members.

(2) Six of the full-time members of the panel shall be physicians licensed to practice in the state of Montana, and six shall be attorneys licensed to practice in the state of Montana.

(3) The panel is divided into two hearing panels, one of which shall hear and determine each claim, and each one of which shall be composed of three attorneys and three physicians and chaired by an attorney.

(4) Full-time members of the panel are interchangeable between the two hearing panels and shall be assigned to a hearing panel on a claim-by-claim basis at the direction of the secretary.

(5) At least two attorneys and two physicians shall be necessary for a quorum for the transaction of any hearing or the rendering of any decision required by this act to be final.

(6) In a case involving a health care provider other than a physician, a part-time panel member practicing the same profession as involved in the claim shall sit on the hearing panel in place of a physician. In any case involving

both a physician and a health care provider other than a physician, the representative of such other profession shall additionally sit on the hearing panel and shall be a part-time member.

(7) Each full-time member of the panel, except those first appointed, shall hold office for 3 years and until his successor is appointed and qualified. On or before January 1, 1978, and effective on that date, the governor shall appoint four members to a term of 1 year, four members to a term of 2 years, and four members to a term of 3 years. Future appointments to fill expired terms shall be for a period of 3 years.

(8) Appointment of attorney and physician members shall be made by the governor from a list of three nominees for each vacancy selected and nominated by the state bar of Montana and the Montana medical association, respectively.

(9) The governor shall, with regard to any vacancy, make his appointments from the lists as provided above within 30 days following the day the position becomes vacant.

Section 7. Removal of panel members — vacancies. (1) Any member of the panel may be removed by the governor at any time for incompetency, neglect of duty, misconduct in office, or other good cause, which is to be stated in writing in the order of removal.

(2) In the case of a vacancy in the membership of the panel, the governor shall appoint for the unexpired term from nominees in the same manner as for original appointments.

Section 8. Compensation of the panel and staff — facilities for offices and hearings. (1) All full-time members of the panel shall be paid a salary in the amount of $35 an hour, under guidelines promulgated by the secretary. Part-time members shall be paid a salary equal to that allowed to members of the Montana legislature while the legislature is in session.

(2) All members of the panel and its assistants are entitled to receive their actual and necessary expenses while traveling on the business of the panel. Expenses shall be approved by the secretary of the panel before payment is made.

(3) The panel shall appoint a secretary and may remove such secretary. The secretary shall administer oaths, receive claims filed, promulgate forms required hereunder, issue subpoenas in connection with the administration of this act, and perform all other duties required to fairly and effectively administer this act.

(4) The panel, subject to the approval of the governor, may employ and fix the compensation of such clerical and other assistants as it may consider necessary.

(5) The panel shall provide itself with adequate offices in the city of Helena, in which the records shall be kept and its official business be transacted. It shall also provide the necessary office furniture, stationery, and other supplies.

(6) Panel hearings shall be conducted in the county where the injury allegedly occurred but may, within the sound discretion of the hearing panel, be held in any other county if the panel considers it necessary or advisable. The county commissioners or other governing authority shall provide, upon the request of the secretary of the panel, suitable facilities for any such hearing.

Section 9. Notice — how served. Notice of all hearings, orders, determinations, and proceedings of the hearing panels required by this act to be served, shall be given by certified mail, return receipt requested, at the last known address of the person to be so served.

Section 10. Evidence to be considered. (1) Unless directed otherwise by the hearing panel, the evidence to be considered by a hearing panel must be submitted by the respective parties in documentary form only. The evidence may consist of medical charts, x-rays, laboratory tests, depositions of witnesses, and any other form of evidence allowable by the hearing panel.

(2) All parties shall be allowed to use any discovery

procedure provided for by the Montana rules of civil procedure, and in the manner provided for therein. Depositions may be introduced into evidence without regard to the availability of the witness to testify. Discovery as to expert witnesses is not admissible unless such expert witness was in practice in the same or a similar community in the state of Montana, in the same profession, and at the same time as the alleged incident occurred as the health care provider whose standard of care is at issue.

(3) Any motion for relief arising out of the use of such discovery procedures shall be decided by the chairman of the hearing panel, who may in his discretion make reasonable limitations on the extent and scope of discovery.

Section 11. Hearings and final determinations. (1) The secretary shall, with the advice and cooperation of the parties and the hearing panels, fix the date and time for all hearings on claims before a hearing panel. A final decision on each claim shall be made within 120 days of the date the claim is filed with the secretary, unless for good cause shown, upon order of the chairman of a hearing panel, such time is extended.

(2) If a final decision on a claim is not made within 10 months of the date the claim is filed, the jurisdiction of the panel on the subject matter shall terminate and the parties may proceed in accordance with the law.

Section 12. Law and rules applicable -- powers of the panel. (1) Except as provided in this act, the panel will be bound by the common and statutory law and by the Montana rules of civil procedure but will conduct hearings and make all determinations as in its judgment are best adapted to ascertain and determine the rights of the parties expeditiously and accurately to carry out justly the spirit of this act.

(2) The panel may:

(a) adopt rules to carry out the provisions of this act;

(b) prescribe the means, methods, and practices necessary to effectuate such provisions;

(c) approve settlement agreements on claims of medical liability;

(d) order physical examinations;

(e) apply to any district court having requisite jurisdiction to enforce the production and examination of books, papers, and records; and

(f) exercise all other powers and duties conferred upon the panel hereafter by law or provided in this act.

(3) The panel may, upon the application of either party or upon its own motion, appoint a disinterested and qualified physician or other professional person or expert to make necessary professional or expert examination of the

claimant or relevant evidentiary matter and to report in writing in respect thereto.

(4) The panel may subpoena any witness to testify pursuant to the rules appropriate to civil actions with respect to parties to a controversy and may apply to any district court of this state for enforcement of such subpoenas.

Section 13. Votes of hearing panel. A majority vote of those present at a hearing panel is sufficient to make any determination. The chairman of a hearing panel may vote only to break a tie vote of the hearing panel.

Section 14. Compensation for medical liability. The claim shall be heard as one for compensation for medical liability. The hearing panel shall review the evidence submitted and hear any testimony to be elicited with reasonable dispatch and shall make one of the following determinations, which determination shall be sent to the parties:

(1) The evidence supports the conclusion that the defendant or defendants failed to comply with the appropriate standard of care as charged in the complaint and that the conduct complained of was a substantial factor of any resultant damage.

(2) The evidence supports the conclusion that the defendant or defendants failed to comply with the

appropriate standard of care as charged in the complaint but that the conduct complained of was not a substantial factor of any resultant damage.

(3) The evidence does not support the conclusion that the defendant or defendants failed to meet the applicable standard of care as charged in the complaint.

Section 15. Award schedule for medical liability. (1) If the determination of the hearing panel is that the evidence supports the conclusion that the defendant or defendants failed to comply with the appropriate standard of care as charged in the complaint and that the conduct complained of was a substantial factor of any resultant damage, then the hearing panel shall make a final award within the following limits as to the nature of the award but without limit as to amount:

(a) For death of a minor without dependents, the compensation recoverable shall be the reasonable value of the minor's services to his parents or legal guardian, during minority, less the reasonable cost of the maintenance of the minor, which compensation shall inure to the exclusive benefit of the parent or guardian, plus any reasonable medical, hospital, funeral, burial, or related expense. The sole right to institute the claim or claims provided for in this subsection is in the personal representative of the deceased, for the exclusive benefit

of:

(i) such parent or parents or legal guardian; and

(ii) the persons incurring such medical, hospital, funeral, burial, and related expense.

(b) For death of an adult without dependents, the compensation recoverable shall be the reasonable value of all hospital, medical, or other related expense plus the reasonable cost of funeral and burial, plus an amount which the hearing panel may determine reasonable for the cost of prosecuting the claim. The sole right to institute the claim under this subsection is in the personal representative of the deceased for the exclusive benefit of those incurring such expense.

(c) For the death of a minor or adult with dependents, the compensation recoverable may include the actual or prospective loss of earnings for the working life expectancy of such deceased less the reasonable cost of the maintenance of the deceased, plus the reasonable cost of the deceased's medical, hospital, funeral, and burial expense, plus an amount the hearing panel may determine reasonable for the cost of prosecuting such claim. The sole right to institute the claim provided for in this subsection is in the personal representative of the deceased dependents and for those incurring such expense.

(d) For bodily injury to an adult or minor not

resulting in death, the hearing panel may allow for any injury or damage, general or special, allowed by law, including loss of earnings to be based on the work expectancy of the claimant without regard to his injured condition; the reasonable medical, hospital, and related expense, past, present, and future; and pain and suffering, past, present, and future. Provided, however, that all damages for pain and suffering must have a basis in the evidence submitted to support the claim thereof, in a fair and reasonable amount, free from sentiment and taking into account the nature and extent of the injuries and the suffering occasioned by them, the duration and prospective duration thereof, the age, health, habits, and condition of the injured party before the injury as compared with his condition in consequence thereof. Future pain and suffering may be awarded only to the extent that there is requisite certainty or probability that such pain and suffering will result from the injury received based upon the claimant's life expectancy in his injured condition.

(2) The compensation and benefits awarded by this act shall be reduced by any collateral source of compensation benefits as provided by law.

Section 16. Payment of awards. The hearing panel shall order all payments of future damages as provided by law.

Section 17. Award and taxing of costs. In all

proceedings before the hearing panels, the costs shall be awarded and taxed as provided by law in ordinary civil actions, with the exception that if, in the opinion of the hearing panel, a claim for medical liability was filed without probable cause for the claimant to believe he was legally entitled to relief, then the cost shall include the cost of defense, including a reasonable attorney's fee.

Section 18. Claims not assignable -- exempt from creditors' claims. No claims for compensation under this act may be assignable, and all compensation and claims therefor shall be exempt from all claims of creditors, assignees, or subrogees.

Section 19. Designation of parties -- joinder of parties -- separate hearings. The person filing the claim is the claimant, and the adverse party or parties is the respondent or respondents. The rules for joinder of parties are as otherwise allowed by law. The hearing panel may make orders to prevent a party from being embarrassed, delayed, or put to expense by the inclusion of parties against him and may order separate hearings or make other orders to prevent delay or prejudice.

Section 20. Filing and service of claims. All claims shall be filed on forms provided by the secretary. The claimant must attach to the forms the proposed complaint, which shall be prepared and served upon the health care

providers named therein by the claimant, in the same manner and form provided by law for civil actions. The summons shall conform to the requirements of the panel. The secretary shall notify concerned health care providers.

Section 21. Additional pleadings. All health care providers served with a proposed complaint shall, within 20 days from the date of service thereof, answer in the form and manner provided by law for civil actions. Any health care provider who fails to so answer is subject to liability under the law without regard to the provisions of this act. There may be no other pleadings.

Section 22. Attorney fees. The amount of attorney fees to be paid shall be included in the record of the trial and shall be paid to the attorney by the respondent or his insurer in addition to any award made to the claimant. If the respondent is awarded attorney fees, the amount shall be included in the record of the trial. The district court in the county in which the claim is heard shall, at the request of any party, determine the reasonableness of each party's attorney fees ordered paid by the other party. The court shall take into consideration the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;

(2) the likelihood, if apparent to the client, that

the acceptance of the particular employment would have precluded other employment by the attorney;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by other circumstances;

(6) the nature and length of the professional relationship with the attorney and client; and

(7) the experience, reputation, and ability of the attorney performing the services.

Section 23. Proof of financial responsibility — insurance, cash or surety bond. (1) Each health care provider subject to the terms of this act shall, within 30 days after this act takes effect, file with the secretary, in a manner prescribed thereby, proof of financial responsibility.

(2) Each health care provider, except as provided by [section 24] shall acquire and maintain in force professional liability insurance of not less than $250,000 for each occurrence and $500,000 in the aggregate for all claims occurring in any one policy year or, as an alternative, qualify as a self-insurer upon making proper application and being approved by the commissioner of insurance.

(3) Self-insurance subject to approval by the commissioner of insurance is effected by filing with the commissioner in satisfactory form:

(a) a continued undertaking by the health care provider to pay any award rendered under this act, except as provided by [section 24], to the first $250,000 for each incident and to $500,000 in the aggregate for all claims occurring in any one year; and

(b) evidence that appropriate provision exists for prompt and efficient administration of all claims; and

(c) evidence that reliable financial arrangements, deposits, or commitments exist providing coverage substantially equivalent to that afforded by a policy of insurance required in subsection (2) of this section for the payment of medical liability claims.

Section 24. Failure to provide proof of financial responsibility — failure or refusal to accept panel determination. (1) A health care provider is subject to liability under the laws of this state with respect to a claim, without regard to the provisions of this act, except as provided in [section 26] if he fails or refuses to:

(a) provide proof of financial responsibility as provided in [section 23];

(b) pay the annual assessment provided for in [section 26], in a manner and amount fixed by the secretary; or

STATE OF MONTANA

REQUEST NO. 357-77

FISCAL NOTE

Form BD-15

...ntance with a written request received February 3, 19 77, there is hereby submitted a Fiscal Note ... House Bill 647 pursuant to Chapter 53, Laws of Montana, 1965 - Thirty-Ninth Legislative Assembly.

...ound information used in developing this Fiscal Note is available from the Office of Budget and Program Planning, to members ... Legislature upon request.

...RIPTION OF PROPOSED LEGISLATION:

... Bill 647 proposes to establish a mandatory pretrial review panel to hear and determine claims for medical liability, ...tablish rules, procedures and facilities to implement and accomplish the purpose of the act, to provide for a schedule ...mpensation and benefits for awards, to guarantee the financial responsibility of health care providers and to provide the ... for the funding of the administration of the act and the payment of awards.

...MPTIONS:

...h six member review panel will hear approximately twenty medical malpractice claims per year.
... hearing on each claim will take approximately four days on the average.
...h panel member will spend approximately 640 hours per year hearing claims.
... twelve-man pretrial review panel will meet as a single group at least five days a year for initial discussions, rule-making, ... general business meetings which adds an additional 480 man hours to its workload.
... full-time executive secretary would be classified at approximately Grade 17.
... full-time legal secretaries would be required at approximately Grade 8 each.

...L IMPACT:

...ue: Funding for the administration of this act is to be provided by an assessment to each health care provider.

...diture:

	FY 78	FY 79
Personal services	$325,559	$326,390
Operating expenses	67,100	73,450
Capital outlay	11,000	2,500
... Additional cost of proposed legislation	$403,659	$402,340

...NICAL NOTE:

... malpractice review board is not attached to any state agency, nor does it appear to constitute the 20th department ...e government under the Executive Reorganization Act.

Richard L. Irion for

BUDGET DIRECTOR

Office of Budget and Program Planning

Date: 2-5-77

JUDICIARY COMMITTEE

45th Legislature

Bill No.	Subject Matter	Date In	Sponsor	Hearing Date	Committee Action	Date Out
HB 647	establish a mandatory pre-trial review panel to hear & determine claims for medical liability, to establish rules, etc.	2-2	Scully	Weds 9th	do pass amended	2-24
HB 654	to prohibit placement of youths in need of supervision at detention facilities & to prohibit evaluations, etc	2-2	Meloy	Tues. 8th	do pass as amended	2-15
HB 641	revision of laws relating to the state department of institutions, etc. amending	2-3	Courtney	Wed 9th	do pass as amended	2-11
HB 664	Montana water use act - to clarify definition, etc. appropriation of 10,000 acre feet a year or more must prove, etc.	2-3	Day	Thursday 17th	WATER do pass amended	2-24
HB 672	to permit district judges, when sentencing criminal defendants, to restrict eligibility for parole, etc.	2-3	Colburn	Thurs 10th	sub-committee do pass as amended	2-15
HB 673	alter certain judicial district boundaries & the # of judges in certain districts & to create new districts,	2-3	Colburn	2-10	indefinitely postponed	2-11

JUDICIARY COMMITTEE
February 9, 1977

The regular meeting of the House Judiciary Committee was called to order at 8:00 a.m. by Chairman Scully in room 436 of the Capitol Building, Helena, Montana. All members were present except Representatives Dussault, Lory and Seifert.

Scheduled for hearing were House Bills 641 and 647.

HOUSE BILL #641:
REPRESENTATIVE COURTNEY, DISTRICT #86:
This bill is concerned with the aftercare of youths in alleged violations. I want to amend on page 1, line 15 and 16, strike: "or by any person" and on page 2 line 6, stike: "and the facts constituting alleged violation"; on page 3 line 11 - line 13 "board to department; page 3, line 24 through 1 and 2 on page 4. He stated these amendments would clarify, make more clear.

DAN RUSSELL, CHIEF OF BUREAU OF AFTER-CARE:
This would provide more kinds of evidence, make different kinds of arrangements, than arrange too restrictive a hearing or review.

REPRESENTATIVE COURTNEY:
I was concerned about the rights of a youth being protected. I feel the amendment does that.

The hearing closed on House Bill 641.

THE HEARING OPENED ON HOUSE BILL #647:

CHAIRMAN SCULLY turned the meeting over to vice-chairman Teague, to present this bill.

REPRESENTATIVE SCULLY, DISTRICT #76:
This bill will establish a mandatory pre-trial review panel to hear and determine claims for medical liability. It would establish rules, procedures and facilities to implement the purpose and also provide for a schedule of compensation and benefits for award. It would guarantee the financial responsibility of physicisns and to provide the source for the funding of the act and the payment of awards.

Section 6 deals with the structure of the panel, screening the claims. On page 6, section 5 the wording is not clear. On page 12, subsection (2) is the part dealing with the collateral source rule. I believe in it only so far as it is not by the individual. I think the mandatory pre-trial panel is very important. I personally feel that this will lead to some change in the rates. It will eliminate a great bulk of the defense costs of the insurance company. This will facilitate a lot of the difficulties we have in the medical-legal pre-trial panel. The point here I think would help more than anything is in the actuarial. The premiums collected in any given calendar year might not be paid out that year. I think the number of cases will be reduced because of the

fact it is mandated in the pre-trial panel. I don't anticipate a reduction in premiums until 1981 or 1982. I don't think they would be cleared out for four years.

GERALD NEELY, MONTANA MEDICAL ASSOCIATION:
Among the more frequently quoted and disturbing reasons put forth for the "malpractice crisis" is a suggestion that the increase is directly due to a deterioration in the quality of medical care being delivered in Montana. Under section 1 the bill is limited in its impact. In this way it differs from Senate Bill 402.

On page 2, section 3 deals with pre-conditioned suit, and section 4 with the statute of limitations. Section 5 can be written in a couple of different ways. On page 3, section 6, the concept of a pre-trial screening is of great merit. On page 6, section 10, areas of evidence would be considered. Section 14, conclude both the question of liability and the question of damages. Section 15 is the award schedule for medical liability. Page 18, section 26, the admissability of evidence. There have been court tests of this kind of a proceeding. The concept is what is critical, subject to the input.

CHAD SMITH, MONTANA HOSPITAL ASSOCIATION:
There has been a tremendous increase in the cost of insurance. The cost of the insurance now reflects in the patients bill. Any procedure that will direct to a settling of claims will be an improvement. We are looking for a just compensation in cases that do have merit.

OPPONENT, BOB RYAN:
I have, in the past, handled cases of this nature for the claimant. The last two or three years has seen a rise in the cost of insurance. There is no evidence they can give that these rates will go down. They are not subject to the anti-trust laws. Of the 4 million spent on this insurance in Montana only 900 doctors pay that. If it were spread over all physicians it would be less than $4000. The lawyers, doctors and legislators, without any real study are attacking the insurance system. There is no proof to our knowledge that actions have risen extensively. They do propose 4 propositions in their article, statutory requests should all be the same regardless of the size of the practice. Special privileges for the privileged few is not new. I wonder what you would do if you had a panel of lawyers. If you are going to have a panel it should be of lay people and I also oppose the voluntary panel.

He gave examples of cases in which the panel would not work. I would like to have you have the four recommendations.

OPPONENT, GREG MORGAN, STATE BAR OF MONTANA:
He commented that Mr. Ryan does not represent the bar association. He gave a handout to the committee stating the position of the bar association. (copy attached)

FRANKLIN LONGAN, MONTANA BAR ASSOCIATION:
I have been on a panel to review these cases, and it has been a success. We have 12 members, 6 doctors and 6 lawyers. These panels have been operating without expense to anybody. We only make recommendations. No one else is allowed at the hearing, only the doctors and the lawyers, and the witnesses. No press. All records are made available to the panel.

MR. LORY CAME IN.

Mr. Longan continued, It has broken down in the past few years. The fault is the insurance companies, so the doctors have told us. Aetna has said they would not let the doctors appear before the panels any more. The panels have worked and we want them to work. I am in favor of a mandatory panel. However, don't allow any panel to determine damage. In section 10, I notice, only Montana doctors are allowed, and that is unfortunate. This is a violation. He discussed section 11, it seems it should be like a jury does, do it immediately. In section 12, we should not figure out what the settlement should be. It involves one of our consitutional rights.

He commented about section 13, asking the panel consist of 3 doctors and 3 lawyers and the chairman must be a lawyer. Sections 14 and 15 call for the award of damage. This panel should not be concerned with awarding damages. It is a big enough job to set on the panel.

TOM DOWLING, TRIAL LAWYERS ASSOCIATION:
We have touched on some of the problems. The trial lawyers are opposed to this bill.

ARNOLD BURGER, YELLOWSTONE BAR ASSOCIATION:
Discussed some of the things wrong with the bill, in his opinion. Section 14 (c), I think this was a carry-over. We do support a mandatory panel to screen claims. I hope this committee is waiting until the entire package is put borth before reaching a decision. One of the things wrong with this, everyone of the panel has an interest in the outcome, even it it is equalized. Another thing, why should a bond have to be posted in this ype of case when he does not have to in any other. The court should consider only the evidence and what the panel has determined should not be admissable evidence. He went on and discussed the fees section of the bill.

WALTER MURFITT, STATE BAR OF MONTANA:
I merely agree with Mr. Longdon and Mr. Burger on the shortcomings of the bill.

REPRESENTATIVE SCULLY:
I want to thank the Yellowstone Bar for appearing. I would like to speak to a couple of issues. I don't think the courts are really

free. They never have been. The insurance companies never figure their figures on the cost figures, they figure it on the possible loss figures.

Mr. Scully went on to discuss the testimony of the opponents. He talked about the honest mistakes or dishonest mistakes. If we put a mandatory panel in there are few rules to play by. Then you have to allow for the liability factor to the district. If you are talking about presenting the findings there is the fact that you have a limitation on the evidence you are going to present.

The constitutional issue does not apply. You can fix that by framing it in language so it is an administrative procedure. He went on in further detail to explain the procedure. I would suggest that damages is a proper consideration at that stage of the game.

REPRESENTATIVE RAMIREZ:
If the Bar Association and the Yellowstone Bar going to get behind Senate Bill 402.

MR. DOWLING:
I can't say for sure that they will get behind a mandatory panel.

MR. BURGER:
The Yellowstone Bar will probably support Senate Bill 402.

MR. MURFITT:
The bar will be supporting that bill.

MR. MORGAN:
The Bar Association will support it.

In answer to a question from the committee, Mr. Morgan stated that the collateral source rule provides in effect that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer. In answer to another question, he stated that "toling" involves the statute of limitations.

MR. NEELY:
The basic concept is the same in both bills. However, there is a subsection that is different between the two bills.

REPRESENTATIVES SEIFERT, EUDAILY and DUSSAULT came in.

REPRESENTATIVE ROTH:
Will you explain the self-insurance program.

MR. NEELY:
This would be a joint underwriting association for a self-supporting program of medical malpractice insurance.

Then followed discussion about the original panel. Mr. Murfitt was chairman of the Western District Panel. He stated, in answer to a question, that they did not know how anyone voted but the vote count was announced.

After some general discussion the hearing closed on House Bill 647.

The meeting adjourned at 11:55 a.m.

JOHN P. SCULLY, CHAIRMAN

Mary Ellen Connelly

Mary Ellen Connelly, Secretary

JUDICIARY COMMITTEE
February 15, 1977

An extra meeting for the study of the malpractice insurance bills was held on Tuesday evening at 7:00 p.m. in room 436 of the Capitol Building, Helena, Montana. Chairman Scully presided. All members were present except Representative Colburn.

CHAIRMAN SCULLY explained the ground rules, since all of these bills had already been heard before.

HOUSE BILL #200:

GREG MORGAN, MONTANA BAR ASSOCIATION:
He presented proposed amendments to the committee.

TOM DOWLING, TRIAL LAWYERS ASSOCIATION:
I have prepared a positon paper which I will leave with the committee. This paper includes the other bills in the malpractice series, as well as HB 200.

GARY NEELY, MONTANA MEDICAL ASSOCIATION:
The Medical Association supports House Bill 200. We will accept Mr. Morgan's amendments.

HOUSE BILL #201:

SAM HADDON, STATE BAR OF MONTANA:
I have served for about 5 years on the medical, legal division and the state bar of Montana is on record against House Bill 201. I am told by the medical people that they consider this bill an absolute must.

JAMES MOORE, KALISPELL ATTORNEY:
This bill would cut down the time of the insurance company exposure, theoretically permitting the company to reduce its premiums. The rights of the child cannot be prejudiced until majority, prior to which the child has no standing before the court. Many of the injuries are head injuries. He gave an example of a case he had handled, mentioning that oftentimes these head injuries result in epileptic seizure and maybe not until the statute of limitations has run out.

FRANK MORRISON, WHITEFISH ATTORNEY:
I do a great deal of work in the field of personal injury. I work closely with doctors. This is one of the bills that has very little to do with the problem of the increased premium dollar. You would be taking away the right of compensation without doing what you want this bill to do. I can assure you that this bill won't affect the premium dollar any.

from the same community. It should be a fixed standard. I think it is very important that he should know in advance what his accountability is. I ask that you expecially study section 3.

MR. DOWLING:
What I think we trying to do is make case law statutory.

MR. CAVIN:
These amendments do not in any way meet the objection to the bill.

The hearing closed on House Bill 574.

HOUSE BILL #639:

MR. NEELY:
I ask that you seriously consider the bill. This is concerned with periodic payments. It has one drawback. If the individual judge does not condition upon a certain situation. The bill does provide they have these future damages. This is complicated.

MR. MORGAN:
The Bar Association is strongly in opposition.

MR. HADDON:
This is applicable to all personal injury claims. The most serious thing that this bill does is that it invites litigation forever. I do see any end in litigation in this proposal.

MR. MOORE:
You should consider voluntary and involuntary. In an action or damages, the district court must enter a judgment ordering that money or its equivalent for future damages of the creditor be paid in whole or in part by periodic payments rather than in a lump sum payment. The traditional method of awarding future damages is far less burdened with administrative difficulty, potential inequity, and possible insufficiency of recovery.

The hearing closed on House Bill #639.

HOUSE BILL #647:

MR. LEAPHART:
I want to mention that this is the mandatory arbitration bill and the Montana Trial Lawyers are opposed to it. It establishes a pretrial review panel to require pretrial review of medical negligence claims. There could be a built-in prejudice of the panel, including a financial interest in the results. The no-fault provisions are totally impractical and unrealistic. A truly impartial panel would probably consist of responsible lay persons with a nonvoting medical and a nonvoting legal advisor.

JUDICIARY COMMITTEE

EXECUTIVE SESSION
February 23, 1977

The House Judiciary Committee met for executive session at 7:00 a.m. Wednesday, February 23, 1977 in room 436 of the Capitol Building, Helena, Montana. Representative John Scully presided. All members were present, with the exception of Day, Conroy, Kennerly and Teague.

HOUSE BILL #647:
REPRESENTATIVE RAMIREZ reported on the proposed amendments. He moved their adoption. The motion carried with the vote unanimous. It was decided to withhold action until the following day when the amendments would be typed and a copy presented to each member.

HOUSE BILL #316:
REPRESENTATIVE RAMIREZ reported on the progress of the amendments as proposed for this bill. Action had been taken in an earlier meeting but it was decided the amendments would require too much work and even then the bill would be unworkable.
REPRESENTATIVE RAMIREZ moved "do not pass".
The motion carried with Representatives Dussault and Holmes voting "no".

HOUSE BILL #761:
REPRESENTATIVE SEIFERT moved "do not pass".
The motion carried with the vote 9 to 5.

No	Yes	
Courtney	Baeth	Lory
Dussault	Colburn	McLane
Holmes	Hand	Roth
Ramirez	Eudaily	Seifert
Scully	Keyser	

Representatives absent and not voting were Day, Conroy, Kennerly and Teague.

HOUSE BILL #782:
REPRESENTATIVE RAMIREZ reported on the proposed amendments. Copies will be presented to the committee at the next executive meeting.

HOUSE BILL #457:
REPRESENTATIVE LORY moved "do pass".
The motion carried with the vote unanimous.

The meeting adjourned at 7:45 a.m. for the regular meeting.

JOHN R. SCULLY, CHAIRMAN

Mary Ellen Connelly

Mary Ellen Connelly, Secretary

FORTY-FIFTH LEGISLATIVE SESSION

1977

COMMITTEE ON JUDICIARY

BILL NO.	ENTERED COMM.	DATE CONSIDERED	OUT OF COMM.	DO PASS DATE	DO NOT PASS DATE	DO PASS AS AMEND. DATE	BE CONCURRED IN DATE	BE CONC. IN AS AMENDED DATE	BE NOT CONCURRED IN DATE
H.B. 589	2-17-77	3-21-77	3-24-77					3-24-77	
H.B. 590	2-17-77	3-2-77	4-1-77						4-1-77
H.B. 607	2-17-77	3-16-77	3-16-77					3-16-77	
H.B. 633	2-23-77	3-22-77	3-24-77						3-24-77
H.B. 647	3-5-77	3-28-77	3-31-77					3-31-77	
H.B. 654	2-25-77	3-25-77	4-6-77				4-6-77		
H.B. 668	3-2-77	3-14-77	3-24-77						3-24-77
H.B. 688	3-3-77	3-23-77	4-1-77						4-1-77
H.B. 713	3-7-77	3-26, 4-4, 4-5-77	4-5-77						4-5-77
H.B. 718	2-23-77	3-22-77	3-22-77					3-22-77	
H.B. 721	2-16-77	3-18-77	3-19-77				3-19-77		
H.B. 758	3-2-77	3-21-77	3-21-77				3-21-77		
H.B. 761	3-5-77	3-26-77	3-29-77						3-29-77
H.B. 761	3-29-77	3-31-77	Tabled 3-31-77						
H.B. 763	3-2-77	3-15-77	3-15-77					3-15-77	
H.B. 738	3-3-77	3-23-77	4-6-77					4-6-77	

(Separate Sheet for Senate, House Bills, and Resolutions)

MINUTES OF MEETING
SENATE JUDICIARY COMMITTEE
March 28, 1977

The meeting of this committee was called to order on the above date by Senator Turnage, Chairman, at 9:35 a.m. in Room 415 of the State Capitol Building.

ROLL CALL:

All committee members were present with the exception of Senator Murray who was excused.

WITNESSES PRESENT TO TESTIFY:

Gerald Neely - Montana Medical Assn.
Tom Dowling - Helena attorney
Glen Drake - American Insurance Assn.
Rep. Ramirez - Billings
Roland V. Colgrove - Miles City attorney representing the Custer County Bar and Southeastern Montana Bar Assn.
Jerry T. Loendorf - Montana Medical Assn.
Chad Smith - Montana Hospital Assn. and American Mutual Alliance
Bill Leaphart - Trial Lawyers Assn.

CONSIDERATION OF HOUSE BILL 647:

Gerald Neely, Montana Medical Assn. representative, said that, after lengthy consultation with the Montana Bar Assn. regarding the pretrial panel review approach, the two associations ask that S.B. 402 be substituted for HB 647, with amendments included in S.B. 402, after the enacting clause of HB 647. He explained the proposed amendments to SB 402. (See Exhibit 1)

Next, Senator Towe moved the adoption of the proposed amendments to SB 402 and the amendment of HB 647 by inserting SB 402 following the enacting clause. The motion carried unanimously.

The memorandum written by Colvin H. Agnew, president of the Montana Medical Assn. was presented to the committee for him as he had been detained by a snow storm on the other side of Bozeman Hill and would not be able to get here for this hearing. (See Exhibit

Tom Dowling, an opponent, said that the Montana Bar Assn. put ir SB 402, but it has been amended here this morning and made the body of HB 647. The insurance carriers will not participate in this part of insurance coverage. They will withdraw from Montana. There is a joint underwriting association bill to form an association being considered this session. He said that he feared that Aetna would pull out. Therefore, he opposed HB 647 and supports SB 402 as first considered.

Glen Drake, representing the American Insurance Assn. and an opponent to HB 647, said that basically they are in favor of a mandatory review panel. However, they do not believe that this bill makes the decision of the review panel final and binding. He also said that Aetna is a member of the AIA and has no intention of withdrawing from Montana but will try to live with the bill.

Gerald Neely, representing the Montana Medical Assn. and a proponent of HB 647, said that it is very clear that Aetna does not want a bill that is not binding and that, in speaking with the American Insurance Assn. on a number of occasions, they said they would take a long hard look at this legislation if it passed. In terms of time and cost of all available evidence, it would save time for insurance companies.

DISPOSITION OF HOUSE BILL 647:

Sen. Warden moved that HB 647 as amended BE CONCURRED IN. The motion carried unanimously.

CONSIDERATION OF HOUSE BILL 200:

Gerald Neely, representing the Montana Medical Assn., asked that action be deferred on this bill if the other bill goes through putting SB 402 into HB 647.

Tom Dowling, a Helena attorney, opposed this bill because a long list of people are left out in HB 200. All people should be treated equitably. If SB 402 is passed, he said that HB 200 is unnecessary. (SB 402 was amended and made the body of HB 647)

Greg Morgan, representing the Montana Bar Assn., said that HB 200 is unnecessary if HB 647 as amended is passed. Otherwise they do support HB 200. He asked that HB 200 be held in committee until they see if HB 647 as amended is accepted.

CONSIDERATION OF HOUSE BILL 782:

Rep. Ramirez of Billings, one of the sponsors of this bill, told the committee that it originated with the Montana Medical Assn. and is a collateral source rule. Right now, if a particular suit is brought against a defendant, the complaint can contain loss from bodily injury and elements of damages. The complainant is entitled to recover actual damages. From his own medical insurance or other, he may have received part of his loss, but in this suit he can recover all of his damage. This is a double recovery. The question is whether society can stand this double recovery. He said that section 3 would allow evidence of remarriage to be shown so that a jury would know if the widow of a person who has been killed remarries.

Gerald Neely, representing the Montana Medical Assn., said a repeal of the collateral source rule would bring about considerable impact on rates. They recommend this type of bill.

Greg Morgan, the Montana Bar Assn. representative, said they support favorable consideration of HB 782.

Tom Dowling, representing the Montana Trial Lawyers Assn., an opponent, said that they oppose this bill.

ROLL CALL

JUDICIARY COMMITTEE

45th LEGISLATIVE SESSION - - 1977 Date 3-28-77

NAME	PRESENT	ABSENT	EXCUSED
TURNAGE, Jean, Chairman	✓		
ROBERTS, Joe, Vice-Chairman	✓		
MURRAY, William			✓
OLSON, Stuart	✓		
LENSINK, Everett	✓		
REGAN, Pat	✓		
TOWE, Tom	✓		
WARDEN, Margaret	✓		

(EX. 2)

MONTANA MEDICAL ASSOCIATION

2021 Eleventh Avenue • Suite 12 • Helena, Montana 59601

March 28, 1977
Monday

M E M O R A N D U M

TO: EACH MEMBER, SENATE JUDICIARY COMMITTEE

FROM: COLVIN H. AGNEW, M.D., PRESIDENT

RE: HOUSE BILL 647

Dear Senator:

On behalf of the Montana Medical Association, we wish to express our appreciation for the opportunity to comment and offer support for the mandatory pre-trial review panel for medical liability claims by offering amendments to SB 402, approved by the State Bar of Montana and the Montana Medical Association, and substituting the terms of SB 402 for those of HB 647.

SCOPE

By mutual agreement, it is limited to physicians licensed to practice medicine in Montana, hospitals, hospital-related facilities, or long-term care facilities.

For administrative purposes, the panel is attached to the Supreme Court.

FUNDING

The fund will be created by an assessment levied on health care providers as defined in the bill. If the professional liability is that of physicians, then physicians should bear the funding of the panel. As other providers are ultimately involved, the allocation of funding would be properly assessed to them. We wish to make it clear that we are not seeking legal defense funds levied against an institution which is not a substantial party to the claim. It is our impression that, at times, it has been difficult for the injured party to determine who might be the responsible party.

PANEL HISTORY

The basis for HB 647 is the track record of the Joint Medical-Legal Screening Panel created jointly by the State Bar of Montana and the Montana Medical Association in 1969. This voluntary panel, composed of equal numbers of attorneys and physicians, was chaired by an attorney and all members served without remuneration.

During the period 1970 through 1975 the Panel ruled on 34 cases of alleged malpractice, finding evidence in 14 cases and none in 20. Attorneys for the 20 cases accepted the Panel finding on 17 and negotiated settlement on only 3 cases. A study of insurance company reports showed that the number of cases of malpractice filed in the courts dropped 54% following the use of the Panel. However, since the Panel was voluntary, only 11.8% of the known cases filed in court were initially pursued through the Panel.

FUTURE

As you well know, the problem of professional liability is very complex. Like a contagious disease, it appears now to be spreading into other professions that previously have been relatively immune.

There are a number of other bills upon professional liability before the legislature. As we gain experience with those which are enacted, we may have a clearer understanding of the elements and may approach future legislative sessions for different remedies.

COMMENDATION

We believe that the House and Senate Judiciary Committees have done a monumental amount of work in drafting this bill and commend them for the end result. This single piece of legislation will do more to stabilize the insurance market and minimize the unfortunate impact of litigation on patients and providers alike.

RECOMMENDATION

We strongly urge the adoption of HB 647 as amended.

CHA:vm

HOUSE BILL NO. 647

INTRODUCED BY SCULLY

A BILL FOR AN ACT ENTITLED: "AN ACT TO ESTABLISH A MANDATORY PRETRIAL REVIEW PANEL ~~TO HEAR AND DETERMINE CLAIMS FOR MEDICAL LIABILITY; TO ESTABLISH RULES, PROCEDURES, AND FACILITIES TO IMPLEMENT AND ACCOMPLISH THE PURPOSE OF THE ACT; TO PROVIDE FOR A SCHEDULE OF COMPENSATION AND BENEFITS FOR AWARDS; TO GUARANTEE THE FINANCIAL RESPONSIBILITY OF HEALTH CARE PROVIDERS TO REQUIRE PROFESSIONAL LIABILITY INSURANCE FOR HEALTH CARE PROVIDERS AND TO PROVIDE THE SOURCE FOR THE FUNDING OF THE ADMINISTRATION OF THE ACT AND THE PAYMENT OF AWARDS; AND OTHERWISE AMENDING THE INSURANCE LAWS WITH RESPECT TO SUCH PANEL~~ FOR MEDICAL MALPRACTICE CLAIMS; PROVIDING ~~A DELAYED~~ AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Refer to Third Reading Bill

(Strike everything after enacting clause and insert:)

Section 1. Short title. This act may be cited as the "Montana Medical Malpractice Panel Act".

Section 2. Purpose. The purpose of this act is to prevent where possible the filing in court of actions against health care providers and their employees for professional liability in situations where the facts do not permit at least a reasonable inference of malpractice and to make possible the fair and equitable disposition of such claims against health care providers as are or reasonably may be well founded.

Section 3. Definitions. As used in this act, the following definitions apply:

(1) "Health care provider" means a physician licensed to practice medicine in Montana or a hospital, hospital-related facility, or long-term care facility.

(2) "Malpractice claim" means any claim or potential claim against a health care provider for medical treatment, lack of medical treatment, or other alleged departure from accepted standards of health care which proximately results in damage to the patient, whether the patient's claim or potential claim sounds in tort or contract, and includes but is not limited to allegations of battery or wrongful death.

(3) "Panel" means the Montana medical malpractice panel provided for in [section 4].

Section 4. Montana medical malpractice panel. (1) The Montana medical malpractice panel is created. The panel is attached to the Montana supreme court for administrative purposes only, except that 82A-108(2) does not apply. The panel shall review all malpractice claims or potential claims against health care providers covered by this act, except those claims subject to a valid arbitration agreement

REFERENCE BILL

allowed by law or upon which suit has been filed prior to the effective date of this act.

(2) Those eligible to sit on the panel are health care providers licensed pursuant to Montana law and residing in Montana and the members of the state bar of Montana.

(3) Claimants shall submit a case for the consideration of the panel prior to filing a complaint in any district court or other court sitting in Montana by addressing an application, in writing, signed by the patient or his attorney, to the director of the panel.

(4) The director of the panel shall be appointed by the executive director of the Montana medical association, subject to the approval of the chief justice of the Montana supreme court. The director shall serve at the pleasure of, and the director's salary shall be set by, the executive director of the Montana medical association, subject to the approval of the chief justice.

Section 5. Compensation of the panel and staff -- facilities for offices and hearings. (1) All members of the panel shall be paid a salary in the amount of $40 an hour, under guidelines promulgated by the Montana supreme court.

(2) All members of the panel, the director, and his staff are entitled to travel expenses incurred while on the business of the panel, as provided in 59-538, 59-539, and 59-801, but such expenses shall be approved by the director

before payment is made.

(3) The panel may provide for the administration of oaths, the receipt of claims filed, the promulgation of forms required by this act, the issuance of subpoenas in connection with the administration of this act, and the performance of all other acts required to fairly and effectively administer this act.

(4) The director, subject to the approval of the chief justice, may employ and fix the compensation for clerical and other assistants as he considers necessary.

(5) The panel shall maintain adequate offices, in which its records shall be kept and its official business transacted.

(6) Panel hearings may be held in any county the panel considers necessary or advisable. The county commissioners or other governing authority shall provide, upon request of the director of the panel, suitable facilities for any such hearing.

Section 6. Funding of act. (1) There is created a pretrial review fund to be administered by the director exclusively for the purposes stated in this act. The fund and any income from it shall be held in trust, deposited in an account, and invested and reinvested by the director with the prior approval of the director of the Montana medical association. The fund may not become a part of or revert to

the general fund of this state but shall be open to auditing by the legislative auditor.

(2) To create the fund, an annual surcharge shall be levied on all health care providers. The amount of the assessment shall be set by the director, who shall allocate a projected cost among health care providers on a per capita basis. The director may provide a different allocation upon approval by the supreme court. Surplus funds, if any, over and above the amount required for the annual administration of the act shall be retained by the director and used to finance the administration of this act in succeeding years, in which event the director shall reduce the annual assessment in subsequent years, commensurate with the proper administration of this act.

(3) The annual surcharge for 1977 shall be paid on or before September 1, 1977, and annually thereafter on or before the date physicians' annual registration fees are due under 66-1042. The director has the same powers and duties in connection with the collection of and failure to pay the annual surcharge as the department of professional and occupational licensing has under 66-1042 in connection with physicians' annual registration fees.

Section 7. Panel decision required -- application. (1) No malpractice claim may be filed in any court against a health care provider before an application is made to the

panel and its decision is rendered.

(2) The application shall contain the following:

(a) a statement in reasonable detail of the elements of the health care provider's conduct which are believed to constitute a malpractice claim, the dates the conduct occurred, and the names and addresses of all physicians and hospitals having contact with the claimant and all witnesses. Any amendments to the application must be filed not less than 14 days prior to the hearing date.

(b) a statement authorizing the panel to obtain access to all medical and hospital records and information pertaining to the claim and, for the purposes of its consideration of this matter only, waiving any privilege as to the contents of those records. Nothing in that statement may in any way be construed as waiving that privilege for any other purpose or in any other context, in or out of court.

Section 8. Application procedure. (1) Upon receipt of an application for review, the director or his delegate shall cause to be served a true copy of the application on the health care providers involved. Service shall be effected pursuant to the Montana rules of civil procedure. If a health care provider involved chooses to retain legal counsel, his attorney shall informally enter his appearance with the director.

(2) The health care provider shall answer the application for review and shall submit a statement authorizing the panel to inspect all medical and hospital records and information pertaining to the application and, for the purposes of such inspection only, waiving any privilege as to the contents of those records. Nothing in the statement waives that privilege for any other purpose.

(3) In instances where applications are received employing a theory of respondeat superior or some other derivative theory of recovery, the director shall forward the application to the state professional societies, associations, or licensing boards of both the individual health care provider whose alleged malpractice caused the application to be filed and the health care provider named a respondent as employer, master, or principal.

(4) The panel director shall cooperate fully with the claimant in retaining a physician qualified in the field of medicine involved, who will consult with the claimant upon payment of a reasonable fee by the claimant.

Section 9. Panel selection. (1) Application for review shall be promptly transmitted by the director to the directors of the health care provider's state professional society or association and the state bar, which shall each select three panelists within 30 days from the date of transmittal of the application.

(2) If no state professional society or association exists or if the health care provider does not belong to such a society or association, the director shall transmit the application to the health care provider's state licensing board, which shall in turn select three persons from the health care provider's profession, and where applicable, to persons specializing in the same field or discipline as the health care provider.

(3) Whenever there are multiple defendants, the case against each health care provider may be reviewed by a separate panel, or at the discretion of the panel initially appointed or by stipulation of the parties, a single combined panel may review all the claims against all parties defendant.

(4) Three panel members from the health care provider's profession and three panel members from the state bar shall sit in review of each case.

(5) In those cases where the theory of respondeat superior or some other derivative theory of recovery is employed, two of the panel members shall be chosen from the individual health care provider's profession and one panel member shall be chosen from the profession of the health care provider named a respondent as employer, master, or principal.

(6) Any member shall disqualify himself from

consideration of any case in which, by virtue of his circumstances, he feels his presence on the panel would be inappropriate, considering the purpose of the panel. The director may excuse a proposed panelist from serving.

(7) Whenever a party makes and files an affidavit that a panel member selected pursuant to this section cannot, according to the belief of the party making the affidavit, sit in review of the application with impartiality, that panel member may proceed no further. Another panel member must be selected by the health care provider's professional association, state licensing board, or the state bar, as the case may be. A party may not disqualify more than three panel members in this manner in any single malpractice claim, and the affidavit must be filed at least 20 days prior to the date of hearing.

Section 10. Time and place of hearing. A date, time, and place for hearing shall be fixed by the director subject to [section 5(6) of this act], and prompt notice thereof shall be given to the parties involved, the attorneys, and the members of the panel. In no instance may the date set be more than 120 days after the transmittal by the director of the application for review unless the panel finds good cause exists for extending the period.

Section 11. Hearing procedures. (1) At the time set for hearing, the claimant submitting the case for review

shall be present and shall make a brief introduction of his case, including a resume of the facts constituting the alleged professional malpractice which he is prepared to prove. The health care provider against whom the claim is brought and his attorney may be present and may make an introductory statement of his case.

(2) Both parties may call witnesses to testify before the panel, which witnesses shall be sworn. Medical texts, journals, studies, and other documentary evidence relied upon by either party may be offered and admitted if relevant. Written statements of facts by treating health care providers may be reviewed.

(3) The hearing will be informal, and no official transcript may be made.

(4) At the conclusion of the hearing, the panel may take the case under advisement or may request that additional facts, records, witnesses, or other information be obtained and presented to it at a supplemental hearing, which shall be set for a date and time certain, not longer than 30 days from the date of the original hearing unless the attorney bringing the matter for review consents in writing to a longer period.

(5) Any supplemental hearing shall be held in the same manner as the original hearing, and the parties concerned and their attorneys may be present.

(6) No panel member may be called to testify in any proceeding concerning the deliberations, discussions, decisions, and internal proceedings of the panel.

(7) No statement made by any person during a hearing before the panel may be used as impeaching evidence in court.

(8) At least 10 days prior to the hearing, the director shall furnish to each panel member copies of all claims, briefs, medical records, and other documents the director considers necessary.

Section 12. Panel deliberations and decisions. (1) At or prior to the time set for the hearing, the attorney members of the panel shall select a chairman who shall be an attorney and who shall preside over the panel deliberations. The deliberations of the panel are confidential. Upon consideration of all the relevant material, the panel shall decide:

(a) whether there is substantial evidence that the acts complained of occurred and that they constitute malpractice; and

(b) whether there is a reasonable medical probability that the patient was injured thereby.

(2) All votes of the panel on the questions for discussion shall be by secret ballot. The decision shall be by a majority vote of those voting members of the panel who

sat on the entire case. The decision shall be communicated in writing to the parties and attorneys concerned, and a copy thereof shall be retained in the permanent files of the panel.

(3) The decision shall in every case be signed for the panel by the chairman and shall contain only the conclusions reached by a majority of its members and shall list the number of members, if any, dissenting therefrom. The majority may briefly explain the reasoning and the basis for their decision, and the dissenters may likewise explain the reason for disagreement.

(4) The report of the medical review panel is not admissible as evidence in any action subsequently brought in any court of law. The copy of the report shall be sent to the health care provider's professional licensing board.

(5) Panelists and witnesses are absolutely immune from civil liability for all communications, findings, opinions, and conclusions made in the course and scope of the duties prescribed by this act.

(6) The panel's decision is without administrative or judicial authority and is not binding upon any party. The panel may recommend an award, approve settlement agreements, and discuss the same, all in a manner not inconsistent with this section, and all such approved settlement agreements are binding on the parties.

Section 13. Director -- rules of procedure. The director, in consultation with the state bar of Montana and subject to approval of the supreme court, is authorized to adopt and publish rules of procedure necessary to implement and carry out the duties of the medical review panel. No rules may be adopted, however, which require a party to make a monetary payment as a condition to bringing a malpractice claim before the medical review panel.

Section 14. Tolling of the statute of limitations. The running of the applicable limitation period in a malpractice claim is tolled upon receipt by the director of the application for review and does not begin again until 30 days after the panel's final decision is entered in the permanent files of the panel and a copy is served upon the complainant and his attorney by certified mail.

Section 15. Maintenance of records. The director shall maintain records of all proceedings before the panel which must include the nature of the act or omissions complained of, a brief summary of the evidence expressed, the decision of the panel, and any majority or dissenting opinions filed. Any records which may identify any party to the proceedings may not be made public and are not subject to subpoena, but are to be used solely for the purpose of compiling statistical data and facilitating ongoing studies of medical malpractice in Montana.

Section 16. Saving clause. This act does not apply to acts of malpractice occurring prior to its effective date.

Section 17. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 18. Effective date. This act is effective upon its passage and approval.

-End-